

No. 15,733

IN THE

United States Court of Appeals  
For the Ninth Circuit

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RICHARD EDGAR LEWIS,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

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BRIEF FOR THE APPELLEE.

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WILLIAM T. PLUMMER,

United States Attorney,

Anchorage, Alaska,

*Attorney for Appellee.*

FILED

MAR 7 1958

PAUL P. O'BRIEN, CLERK



## Subject Index

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	Page
Jurisdictional statement .....	1
Statement of facts .....	2
Argument .....	4
Conclusion .....	5

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## Table of Authorities Cited

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Statutes	Pages
Alaska Compiled Laws, Annotated, 1949, Vol. II, Section 40-3-2 .....	2
26 U.S.C., Section 2553 .....	2
26 U.S.C., Section 2593 .....	2
28 U.S.C., Sections 1291, 2253 .....	1
28 U.S.C., Section 2255 .....	1, 4, 5
48 U.S.C., Section 101 .....	1



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**JURISDICTIONAL STATEMENT.**

On August 15, 1957, the United States District Court for the District of Alaska, Third Judicial Division thereof, denied Appellant's Motion to Vacate and Set Aside the Sentence under which he is presently incarcerated in the United States Penitentiary, McNeil Island, Steilacoom, Washington.

From the denial of such motion (which was founded on Title 28, Section 2255, United States Code) the instant appeal is being prosecuted by the Appellant.

Jurisdiction below was conferred by 48 U.S.C. 101. Jurisdiction in this Court is conferred by 28 U.S.C. 1291, 2253 and 2255.

**STATEMENT OF FACTS.**

Since the sole issue presented by the instant appeal is a question of law, it is not believed to be necessary to set forth or elucidate any facts.

The only facts which this Honorable Court needs to be familiar with, it is believed, in order to decide this appeal are juridical facts and consists of the content of Appellant's Motion to Set Aside the Sentence and the judgment of the trial Court denying same.

For the purpose, however, of making it unnecessary for the Court to advert to the appeal documents, it will probably be desirable here to mention that the Appellant stands imprisoned at the present time for a conviction under Count II of a consolidated Indictment, said Count II charging a violation of Section 40-3-2, ACLA, 1949 (possession of narcotics May 26, 1951); and stands sentenced to consecutive imprisonments under a conviction of Counts III and IV of the same consolidated Indictment, Count III being laid under Title 26, Section 2553, United States Code (purchase, sale, dispensing and distributing narcotics not in the original stamped package and not from an original stamped package); and Count IV being laid as a violation of Title 26, Section 2593 United States Code (being a transferee of narcotics and required to pay a transfer tax thereupon, but not having paid such tax).

The District Court case numbers under which these Indictments were returned by the grand jury and tried

in the trial Court are Criminal Nos. 2551, 2555 and 2575.

The Court will notice that Count I was not listed or adverted to. This is so because of the fact that your Honorable Court vacated the original Count I. This decision was rendered by your Court in No. 14,871 Edgar Richard Lewis, Appellant, vs. United States of America, Appellee, on June 25, 1956. Count I of the original consolidated Indictment therefore disappeared and in the trial Court mandate proceedings were accomplished and there was adjustment of the Appellant's prisoner's term in accordance therewith.

The Court's attention is attracted to the fact that when your Court vacated the sentence imposed under Count I it expressly "affirmed as to Counts II, III and IV". See last sentence of the opinion handed down in the case referred to, to-wit: No. 14,871 dated June 25, 1956.

One more word of explanation is believed to be necessary. The Court's attention is invited to the fact that the date of the crime involved in Count II is shown by that count to be May 26, 1951, whereas the date of the two crimes which are the subject of Count III and Count IV, respectively, is shown by the last two named counts to be April 7, 1951.

It will be noted by the Court that the Appellant's Statement of Points to be urged on appeal contains an attack only on Counts III and IV, and the gist of the attack is that Counts III and IV state the same

offense and the sentences imposed thereon are therefore invalid.

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### ARGUMENT.

Appellee believes it to be quixotic and supererogatory to cite authorities on a proposition of law so palpably plain as this one. The whole gist of this appeal and Appellant's attack on the denial of his Motion to Vacate under 2255 is that Counts III and IV set forth the same offense. A mere inspection of those two counts shows that they are intrinsically distinct and different. This Honorable Court, of course, needs no citation of authorities for the proposition that one transaction can give rise to a multiplicity of crimes. No authority will therefore be cited for that elementary and universally acknowledged proposition.

Since one transaction may give rise to one or more crimes and since the crimes set forth in Counts III and IV are different, and their difference can be determined merely by visual inspection, the Appellee concludes, without further argument, that the Appellant does not stand, on that point, at least, invalidly sentenced and imprisoned; and he urges no other points in his appeal.



**CONCLUSION.**

Since the Appellant cannot be sustained on the sole attack which he makes, it follows that the judgment of the trial Court denying Appellant's motion under 2255 should be affirmed.

Dated, Anchorage, Alaska,  
March 3, 1958.

Respectfully submitted,

WILLIAM T. PLUMMER,

United States Attorney,

*Attorney for Appellee.*

